

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act-	)	
Competitive Bidding	)	
	)	
Amendment of the Commission's	)	GN Docket No. 90-314
Cellular PCS Cross-Ownership Rule	)	
	)	
Implementation of Sections 3(n)	)	GN Docket No. 93-252
and 332 of the Communication Act	)	
Regulatory Treatment of Mobile	)	
Services	)	

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COMMENTS OF THE  
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") submits these comments to the Further Notice of Proposed Rulemaking, FCC 95-263, released on June 23, 1995 ("FNPRM"). The FNPRM proposes rule changes to address legal uncertainties raised by the Supreme Court's June 12, 1995 decision in Adarand Constructors Inc. v. Pena. ("Adarand").<sup>1</sup>

NTCA is a national association of approximately 500 small local exchange carriers ("LECs") providing telecommunications services to interexchange carriers and subscribers throughout rural America. NTCA members are interested in providing Personal Communications Services ("PCS") and are all included in the Commission's definition of "rural telephone companies," "small businesses," or women owned companies for purposes of the Commission's competitive bidding rules.

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<sup>1</sup> 63 U.S.L.W. 4523.

NTCA has actively participated in Commission proceedings that shaped the competitive bidding rules for broadband Personal Communications Services. Throughout these proceedings, NTCA has urged the Commission to adopt procedures and rules that enable the provision of comparable services in urban and rural areas and that avoid delayed deployment of services to rural areas. NTCA's comments to this latest FNPRM are consistent with its prior position.

Instead of reopening the record in the various competitive bidding dockets for further fact finding, the Commission is proposing to avoid the legal uncertainties surrounding its existing rules following Adarand by making minimal rule changes that can be adopted swiftly.<sup>2</sup> Those changes affect race as well as gender-based distinctions in the existing rules but preserve Section 309(j) preferences based on the financial size of potential bidders. They are intended to prevent further public harm by minimizing the disruption of potential bidders plans and reducing the possibility of further delays due to the regulatory process or litigation. Modification of the rules to eliminate race and gender-based preferences at this stage will give all bidders a better chance of becoming successful PCS providers.

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<sup>2</sup> The Commission believes additional evidence would be required to meet the strict scrutiny standard announced in Adarand. FNPRM at ¶ 8. The strict scrutiny standard requires that any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest. Gender-based distinctions were not directly addressed in Adarand.

NTCA agrees with the Commission's conclusion that further delay of the previously scheduled auctions for the C Block would be harmful to the general public as well as prospective bidders who are in an advanced stage of preparation for the C Block auctions. It also agrees with the Commission's tentative conclusion that modification of the rules to eliminate race and gender-based preferences at this stage will give all bidders a better chance of becoming successful PCS providers. FNPRM at ¶ 9. A speedy resolution of the uncertainties created by Adarand is needed in light of the advanced planning already in progress in preparation for the auction and the headstart that Block A and B licensees already have. Bidders were just three days away from filing their applications to participate in the auctions when the Adarand decision was delivered. The Commission granted all 99 of the licenses to the high bidders in the A and B blocks that will compete with C Block licensees on the day it announced the changes proposed here. Additionally, broadband PCS licenses in areas not put up for bid were issued eight months ago to American Personal Communications, Cox Enterprises, Inc. and Omnipoint Communications, Inc. These events put C Block bidders for all areas at an obvious disadvantage.

The Commission should act swiftly to reduce the harmful effects of these handicaps. The five rule modifications proposed can be adopted and implemented swiftly. More elaborate modifications at this stage would begin a regulatory process likely to take months and involve litigation, including stays

similar to those entered earlier in Telephone Electronics Corp. v. FCC, (No. 95-1015, U.S.C.A.D.C.). The Commission will have no control of the auction schedule if a judicial stay is entered. The potential public harm resulting from a stay of indefinite duration cannot be calculated but is likely to be immense for all potential bidders. A stay of indefinite duration would result in additional costs and losses, including lost business opportunities, markets and customers. Potential bidders have already incurred substantial costs in anticipation of the previously scheduled August 2 auctions and additional costs due to the postponement of that date. These costs may not be recoverable and would have to be duplicated if the Commission were to adopt a new set of rules after a new proceeding involving additional fact finding. In view of this potential for irreparable harm to the public, the proposed modifications should be adopted.

CONCLUSION

For the above stated reasons, NTCA supports the changes the Commission proposes.

Respectfully submitted,

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July 7, 1995

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in PP Docket No. 93-253, GN Docket No. 90-314, and GN Docket No. 93-252 was served on this 7th day of July 1995, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

  
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